

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**J.F., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Waco, TX, Employer**

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**Docket No. 11-133  
Issued: October 19, 2011**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge

ALEC J. KOROMILAS, Judge

COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On October 22, 2010 appellant filed a timely appeal from the September 20, 2010 decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA)<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether OWCP properly determined that appellant's actual earnings as a modified duty clerk fairly and reasonably represented her wage-earning capacity.

**FACTUAL HISTORY**

On July 15, 2008 appellant, then a 63-year-old distribution clerk, felt a sharp pain in her low back and left side at work. She stopped work on July 15, 2008. Appellant had been working in a permanent modified position as a clerk. The position included working four hours per day in manual distribution and four hours in the office answering the telephone and performing

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

paperwork. Appellant's restrictions included 10 pounds lifting/pushing/pulling and no reaching over the shoulder. OWCP accepted her claim for lumbar sprain, lumbar radiculopathy and herniated lumbar disc. Appellant received compensation benefits.<sup>2</sup>

Appellant received treatment from Dr. Les Benson, a general practitioner, from January 2009 through May 2010 and Dr. Jacob Rosenstein, a Board-certified neurological surgeon, from August 2009 through March 2010. In a March 3, 2009 report, Dr. Rosenstein diagnosed right Grade 1, L5 and S1 radiculopathy; L4-5 spondylolisthesis; multilevel lumbar bulging discs with facet arthropathy and lumbar facet syndrome. He recommended continued medications and lumbar epidural steroid injections. Dr. Rosenstein continually advised that appellant remain off work.

OWCP referred appellant to Dr. Robert Holladay, a Board-certified orthopedic surgeon, for a second opinion examination and Dr. William P. Osborne, an occupational medicine specialist, for a functional capacity evaluation (FCE). In his April 8, 2009 report, Dr. Holladay noted appellant's history of injury and treatment and examined appellant. He determined that appellant had no remaining work-related disability. Dr. Holladay explained that any remaining disability was due to her underlying degenerative disc disease. He provided restrictions based upon the April 8, 2009 FCE from Dr. Osborne. In the FCE, Dr. Osborne determined that appellant was to return to sedentary or light duty which was comprised of a maximum of no lifting over 20 pounds; frequent lifting of no more than 10 pounds; sitting and standing for two hours at a time with a short break before repeating; occasional bending; stooping, squatting and kneeling. He also indicated that appellant could walk up several flights of stairs but no climbing ladders or working at unprotected heights.

In a May 6, 2009 report, Dr. Benson disagreed with the findings of Drs. Holladay and Osborne. He stated that appellant had a significant lumbar disc injury with radiculopathy. Dr. Benson noted that, while appellant had adult onset diabetes, her condition was under control and the radiculopathy was not related to her diabetes. He opined that appellant was unable to work in any capacity.

On August 12, 2009 OWCP referred appellant to Dr. Benzel C. MacMaster, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the conflict in opinion between Drs. Holladay and Drs. Roenstein and Benson, regarding appellant's work capacity.

In a September 8, 2009 report, Dr. Benson advised that appellant had objective findings which included palpable spasm, decreased range of motion and positive straight leg raising. He indicated that appellant's conditions had not ceased. Dr. Benson noted that appellant's activities were limited with regard to prolonged standing, sitting, lifting, bending, stooping, and or walking. He opined that he did not believe that appellant would be able to return to the job she performed. Furthermore, Dr. Benson did not believe that work hardening would be beneficial to appellant. He noted that appellant's limitations included inability of prolonged standing, sitting, lifting, bending stooping and or walking. Dr. Benson recommended continued injections and possible surgical intervention.

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<sup>2</sup> Appellant had several previous claims which are not before the Board on the present appeal.

In a September 9, 2009 report, Dr. MacMaster noted having reviewed appellant's medical history of injury and treatment and noted a physical examination of appellant. He indicated that the only objective findings were diminished Achilles' reflexes, which were symmetrical bilaterally. Dr. MacMaster noted the accepted conditions of lumbar sprain, unspecified thoracic or lumbosacral neuritis or radiculitis and disc herniation. He further diagnosed lumbar spondylosis. Dr. MacMaster explained that, although the lumbar sprain may have aggravated underlying arthritis, the evidence on examination showed no residuals of the accepted work injuries. He further noted that the accepted work injury of lumbar sprain was not active or disabling. Dr. MacMaster noted that appellant may well suffer from her preexistent condition which may require medication and self-directed exercise, but they show no material aggravation due to the work injury. He found she was able to return to work as a clerk with the limitations she had before the present injury. In a September 10, 2009 work capacity evaluation, Dr. MacMaster indicated that appellant could work for eight hours per day with restrictions which included: no reaching above the shoulder; pushing and pulling for no more than 30 minutes and no lifting over 10 pounds.

On October 28, 2009 the employing establishment offered appellant a modified mail processing clerk position. The duties included manual letter cases at shoulder height for six hours daily and stamping/taping mail at a heavy table for two hours daily. The physical requirements included four hours of simple grasping, two hours of fine manipulation, and lifting trays for no more than one hour.

On November 4, 2009 OWCP determined further clarification was needed from Dr. MacMaster as to whether the additional accepted conditions of disc herniation and lumbar radiculopathy caused any work-related disability. In a December 14, 2009 addendum, Dr. MacMaster explained that there were no residuals of any of the accepted work injuries. He reiterated that the lumbar sprain may have temporarily aggravated underlying arthritis but his examination did not show any residuals. Dr. MacMaster also determined that appellant's condition had returned to baseline as there was no objective evidence of any residuals of the disc herniation or the lumbar radiculopathy. He opined that there was no evidence that any of the accepted work injuries were currently active or disabling. Furthermore, Dr. MacMaster noted that none of the accepted injuries prevented appellant from returning to work as a mail processing clerk with the specific previously placed limitations. In response to an additional question of OWCP as to whether she required any pain treatment, Dr. MacMaster explained that facet injections would be necessary solely for the diagnosis and treatment of lumbar facet syndrome, which was not a part of the accepted diagnoses. He indicated that no additional treatment was warranted for the accepted conditions.

Appellant accepted the employing establishment's job offer under protest on December 16, 2009.<sup>3</sup>

On January 21, 2010 the employing establishment noted that, effective September 15, 2009, appellant's date-of-injury position of Grade 6, Step 0 earned \$51,049.00 per year. It noted that the current pay rate for the date-of-injury step and grade was equivalent to \$53,102.00 per

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<sup>3</sup> On March 9, 2010 appellant filed a claim for recurrence effective February 18, 2010. This aspect of appellant's claim is being reviewed by OWCP and is not before the Board at this time.

year. Additionally, the employing establishment noted that the current pay at appellant's limited-duty position was \$53,102.00 per year.

In a February 18, 2010 decision, OWCP found that the modified mail processing clerk position fairly and reasonably represented appellant's wage-earning capacity. It found she had been employed as a modified mail processing clerk, effective December 16, 2009, which was over 60 days, and that she earned weekly wages of \$1,077.19. OWCP found that there was no evidence the job was temporary and that the impartial medical examiner's medical restrictions of September 10, 2009 supported appellant's capacity to perform such work. It found that her actual earnings fairly and reasonably represented her wage-earning capacity. In a computation of compensation worksheet, OWCP advised that the weekly pay rate when disability began, effective July 15, 2008, was \$999.24 and the current pay rate for the date-of-injury position, effective February 17, 2010, was \$1,039.47. It used the current rate for appellant's date-of-injury position, \$1,039.47, and applied its standard formula to find a zero loss in wage-earning capacity. Accordingly, OWCP found that appellant had no loss of wage-earning capacity effective February 18, 2010.

On March 8, 2010 appellant's representative requested a telephonic hearing, which was held on June 9, 2010. During the hearing, appellant described the duties of the modified position she performed on her return to work. They included scanning and casing mail. Appellant confirmed that she was not performing full duty at the time of her injury as it was a modified-duty position as a "PDC" training clerk as a result of another work injury. In response to questioning, she claimed that her wage-earning capacity position was not open for bidding from other workers, was not classified, and was made solely to accommodate her restrictions. Appellant noted that she cased mail and signed in scanners from truck drivers and confirmed that if she were not performing those duties, the duties would have to be performed by another employee. Her representative argued that the rating was erroneous because it was based upon a position which was not a real job on which appellant or others could bid; therefore, it was a make-shift type of job.

By decision dated September 20, 2010, OWCP's hearing representative affirmed the February 18, 2010 wage-earning capacity decision.<sup>4</sup>

### **LEGAL PRECEDENT**

Under section 8115(a) of FECA,<sup>5</sup> wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.<sup>6</sup> The formula for determining loss of wage-earning capacity based on actual earnings, developed in the Board's

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<sup>4</sup> The hearing representative remanded the case for consideration of modification of the wage-earning capacity decision and termination of benefits on the basis that no remaining work-related disability or residuals existed.

<sup>5</sup> 5 U.S.C. § 8115(a).

<sup>6</sup> *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

decision in *Albert C. Shadrick*,<sup>7</sup> has been codified by regulation at 20 C.F.R. § 10.403. OWCP procedures provide that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days.<sup>8</sup> The amount of any compensation paid is based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>9</sup>

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>10</sup> The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination.<sup>11</sup>

### ANALYSIS

OWCP accepted appellant's claim for lumbar sprain, lumbar radiculopathy and herniated lumbar disc. Appellant's treating physicians, Drs. Benson and Rosenstein, advised that appellant was unable to work in any capacity; however, Dr. Holladay, the second opinion physician, opined that appellant could return to sedentary or light duty with restrictions. As a result, OWCP referred appellant to Dr. MacMaster, for an impartial medical evaluation to resolve the conflict in medical opinion.

In his September 9, 2009 report, Dr. MacMaster noted appellant's history of injury and treatment and advised that the only objective findings were diminished Achilles' reflexes, which are symmetrical bilaterally. He explained that there were no residuals of the accepted work injury. Dr. MacMaster indicated that appellant was able to return to work as a clerk with the limitations she had prior to the present injury. He completed the September 10, 2009 work capacity evaluation, which indicated that appellant could work for eight hours per day with restrictions which included: no reaching above the shoulder; pushing and pulling for no more than 30 minutes and no lifting over 10 pounds. In his December 14, 2009 addendum, Dr. MacMaster explained that the accepted work injury, the lumbar sprain, temporarily aggravated the underlying arthritis but his examination did not show any residuals. He also determined that appellant's condition had returned to baseline as there was no objective evidence of any residuals of the disc herniation or the lumbar radiculopathy. Dr. MacMaster opined that there was no evidence that any of the accepted work injuries were currently active or disabling. Furthermore, he noted that none of the accepted injuries prevented appellant from returning to work as a mail processing clerk with the specific previously placed limitations. Dr. MacMaster's

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<sup>7</sup> *Albert C. Shadrick*, 5 ECAB 376 (1953).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

<sup>9</sup> See *Sharon C. Clement*, 55 ECAB 552 (2004).

<sup>10</sup> 5 U.S.C. § 8123(a); *Barry Neutuch*, 54 ECAB 313 (2003).

<sup>11</sup> 20 C.F.R. § 10.321.

reports were well rationalized and based on a thorough medical examination and a review of all the prior medical history. Thus, the Board finds that OWCP properly determined that the position offered by the employing establishment was appropriate and consistent with appellant's work restrictions.<sup>12</sup>

On December 16, 2009 appellant accepted the full-time, limited-duty assignment as a modified mail processing clerk. The Board finds that the position of a modified mail processing clerk that she held commencing December 16, 2009 was an appropriate job and properly determined represented her wage-earning capacity. The Board notes that appellant began her modified position on December 16, 2009 and subsequently worked in the position for over 60 days. Appellant's performance of this position in excess of 60 days is persuasive evidence that the position represents her wage-earning capacity.<sup>13</sup> While her attorney asserted during the hearing that the position was make-shift or temporary, he based his argument simply on the fact that it was a modified position. Counsel argued that fact alone rendered it a makeshift position. In support of his argument, appellant cited to *Nancy Darmetko*, Docket No. 97-2539 (January 5, 2000). In that case, the claimant was originally working in a full-time position. The wage-earning capacity decision was based on a part-time position. The Board found this to be inconsistent with its procedure manual as the tour of duty was not equivalent to the date-of-injury position. The Board disagrees that this case stands for the proposition that every modified position, despite the work duties, is by definition a makeshift position. Rather, in the instant case, the date-of-injury position was a full-time position. There is no evidence that the position was seasonal, temporary or makeshift work designed for her particular needs.<sup>14</sup> The position has an official title and consisted of duties normally performed by clerks at the employing establishment. As determined during the hearing, appellant described the duties and confirmed that other employees would have to perform her work if she were away from the employing establishment. The physical restrictions were not unduly restrictive for the position.<sup>15</sup>

The rate of pay for the modified-duty clerk in the amount of \$53,102.00 exceeds appellant's date-of-injury position rate of pay, which was listed as \$51,049.00. Therefore, appellant had no loss of wage-earning capacity under the *Shadrick* formula as of February 18, 2010, as OWCP found in its February 18, 2010 decision.<sup>16</sup>

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<sup>12</sup> *Aubrey Belnavis*, 37 ECAB 206 (1985) (where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight).

<sup>13</sup> OWCP procedures provide that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

<sup>14</sup> *Elbert Hicks*, 49 ECAB 283 (1998).

<sup>15</sup> Compare *A.J.*, Docket No. 10-619 (June 29, 2010).

<sup>16</sup> *Albert C. Shadrick*, *supra* note 7.

As the evidence established that appellant's actual earnings as a modified-duty clerk properly represented her wage-earning capacity, OWCP properly accepted these earnings as the best measure of her wage-earning capacity.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant's actual earnings as a modified-duty clerk fairly and reasonably represented her wage-earning capacity.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the September 20, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 19, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board